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14

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

18 CARL ZEISS AG and ASML  
19 NETHERLANDS, B.V.,  
20 Plaintiffs,  
21 v.  
22 NIKON CORPORATION, SENDAI  
23 NIKON CORPORATION, and  
NIKON INC.,  
24 Defendants.

Case No. 2:17-cv-03221 RGK (MRWx)

**DEFENDANTS NIKON  
CORPORATION AND NIKON  
INC.'S MEMORANDUM IN  
SUPPORT OF THEIR MOTION  
FOR JUDGMENT AS A MATTER  
OF LAW**

Date: July 17, 2018  
Time: 9:00 a.m.  
Courtroom: 850, 8th Floor

Hon. R. Gary Klausner

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1           **I. INTRODUCTION**

2           Defendants Nikon Corporation and Nikon Inc. (collectively “Nikon”) hereby  
3 move for an order granting judgment as a matter of law on eight issues: (1)  
4 Plaintiffs cannot recover damages pre-dating the filing of their complaint because  
5 they failed completely (i.e. offered *zero* evidence) to show compliance with the  
6 marking requirements of 35 U.S.C. § 287 in their case-in-chief; (2) Plaintiffs failed  
7 to prove infringement for unidentified Nikon products; (3) Plaintiffs failed to prove  
8 infringement by representative products; (4) Plaintiffs failed to prove infringement  
9 of method Claim 14 of U.S. Patent No. 7,972,792 (“’792 Patent”); (5) Plaintiffs  
10 failed to prove infringement of the “memory arrangement” limitation of Claims 15  
11 and 23 of U.S. Patent No. 7,209,167 (“’167 Patent”); (6) Plaintiffs failed to prove  
12 any direct infringement of the ’792 Patent or ’167 Patent by Nikon Corporation  
13 within the United States; (7) Plaintiffs failed to prove any induced infringement of  
14 the ’792 or ’167 Patent by either Nikon Corporation or Nikon Inc.; and (8)  
15 Plaintiffs failed to prove any contributory infringement of the ’792 or ’167 Patents  
16 by either Nikon Corporation or Nikon Inc. On each of these issues, Plaintiffs failed  
17 to present legally sufficient evidence to support their claims, and the Court should  
18 therefore enter judgment under Rule 50(a) of the Federal Rules of Civil Procedure.

19           **II. THE STANDARD FOR GRANTING JUDGMENT AS A  
20 MATTER OF LAW UNDER RULE 50(A)**

21           A motion for judgment as a matter of law (“JMOL”) on a particular issue is  
22 proper where a reasonable jury could only find for the movant on that issue after the  
23 evidence has been fully presented. *See Fed. R. Civ. P. 50(a)(1).* A motion for  
24 JMOL may be made at any time before the case is submitted to the jury. *See Fed.*  
25 *R. Civ. P. 50(a)(2).*

26           In ruling on JMOL motions, courts apply the same standard as on summary  
27 judgment: review the evidence of record, draw all reasonable inferences in favor of  
28 the nonmoving party, and determine whether the movant prevails as a matter of

1 law. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (citing  
2 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–51 (1986)).

3 **III. PLAINTIFFS FAILED TO PROVE COMPLIANCE WITH THE  
MARKING STATUTE**

4 It is black letter law that the patentee always bears the burden of pleading and  
5 **proving** compliance with marking. *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1111  
6 (Fed. Cir. 1996) (explaining patentee bears burden of proving compliance with  
7 marking statute); *Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 876 F.3d  
8 1350, 1366 (Fed. Cir. 2017) (“[t]he patentee bears the burden of pleading and  
9 proving he complied with § 287(a)’s marking requirement”). Despite bearing the  
10 burden of proof, Plaintiffs were silent on marking in their case-in-chief.<sup>1</sup> Because  
11 Plaintiffs submitted zero evidence to show that the identified HP products do not  
12 practice the asserted patents, the Court should grant judgment as a matter of law  
13 and exclude pre-filing damages.

14 **A. Applicable Law on Marking**

15 A patentee may only recover damages as of the date they provide notice to  
16 the alleged infringer. 35 U.S.C. § 287(a). Notice may be actual, such as when a  
17 plaintiff sends a letter to the alleged infringer accusing it of infringement or by  
18 filing a complaint for patent infringement. *Amsted Indus. Inc. v. Buckeye Steel  
Castings Co.*, 24 F.3d 178, 187 (Fed. Cir. 1994). Notice may also be constructive  
19 through marking, which is when a patentee or its licensee distributes patent  
20 practicing products marked with the appropriate patent number. *Am. Med. Sys. Inc.  
v. Med. Eng’g Corp.*, 6 F.3d 1523, 1537 (Fed. Cir. 1993). Absent appropriate

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<sup>1</sup> Plaintiffs seek jury instructions stating that “[a]s the party that is  
26 challenging Zeiss’s and ASML’s claim for damages, it is Nikon’s burden to  
27 articulate the products they believe are unmarked patented articles.” (ECF No. 486-  
2 at 32.) This is an incorrect statement of the law. Controlling precedent makes  
clear that “[t]he burden of proving compliance with marking is and at all times  
remains on the patentee.” *Arctic Cat*, 876 F.3d at 1367.

1 notice, Plaintiffs cannot recover pre-suit damages. *Maxwell*, 86 F.3d at 1111.

2 An alleged infringer who challenges the patentee's compliance with marking  
3 under 35 U.S.C. § 287(a) bears an initial burden of production—a low bar—  
4 requiring identification of products it believes to be unmarked “patented articles.”  
5 *Arctic Cat*, 876 F.3d at 1368–69. But the “burden of proving compliance with  
6 marking is and at all times remains on the patentee.” *Id.* at 1367. To meet this  
7 burden, the patentee must prove the identified products do not practice the patents  
8 in question during its affirmative case. *Id.*

9           **B. Nikon Met Its Initial Burden of Production on Marking.**

10 Nikon identified Hewlett-Packard's unmarked, licensed products both in  
11 discovery and during opening statements at trial. Consequently, there can be no  
12 dispute that Nikon has already met the low bar under *Arctic Cat*.

13           In fact, in denying Plaintiffs' motion for summary judgment on marking, the  
14 Court has already held that Nikon met its burden by identifying five specific HP  
15 cameras as practicing the '792 Patent and three specific HP tablets as practicing the  
16 '167 Patent in its discovery responses. (ECF No. 249 at 18; *see also* ECF 161-15 at  
17 4–5 (Plaintiffs' Statement of Uncontroverted Facts admitting that Nikon served  
18 discovery responses before the close of fact discovery identifying several HP  
19 products as practicing the '792 and '167 Patents).) These are the HP d3500, p550,  
20 p650, s510, and CA340 digital cameras for the '792 Patent, and the HP 7, 8, and 10  
21 tablets for the '167 Patent. (ECF No. 161-8 at 8 (identifying HP products).) Nikon  
22 also identified Plaintiffs' license with HP, which does not require HP to mark its  
23 products. (ECF No. 249 at 18; ECF 270-4 at 8 (identifying HP license).)

24           Nikon identified these same HP products during its opening statement at trial.  
25 (July 11, 2018 P.M. Trial Tr. at 36:17–21 (identifying the HP Tablet 10 and HP 650  
26 camera).) Thus, there can be no dispute that Nikon has met its low burden of  
27 production to “identify unmarked products.” *Arctic Cat*, 876 F.3d at 1369.

1                   **C. Plaintiffs Failed to Present Any Evidence that the Identified**  
2                   **HP Products Do Not Practice Any Claim of the '792 or '167**  
3                   **Patents.**

4                  Under *Arctic Cat*, Plaintiffs were required in their case-in-chief to establish  
5                  that the identified HP products “do not practice the asserted patents to recover  
6                  damages under the constructive notice provisions of § 287.” *Id.* at 1369. Plaintiffs  
7                  utterly failed to carry this burden at trial, and judgment as a matter of law is  
therefore required.

8                  Like the patentee in *Arctic Cat*, Plaintiffs licensed the '792 and '167 Patents  
9                  to a third party—HP here.<sup>2</sup> (*Compare* July 11, 2018 P.M. Trial Tr. at 75:18–24  
10                 (admitting HP is licensed) *with Arctic Cat*, 876 F.3d at 1366 (licensing asserted  
11                 patents to third party Honda).) Like the patentee in *Arctic Cat*, Plaintiffs made no  
12                 effort to ensure their licensee HP marked its products. (*Compare* July 11, 2018  
13                 P.M. Trial Tr. 77:23–78:7 (no effort to police marking by HP) *with Arctic Cat*, 876  
14                 F.3d at 1366–67 (patentee made no effort to ensure marking by licensee).) And like  
15                 the defendant in *Arctic Cat*, Nikon met its burden of production by identifying  
16                 unmarked, licensed products—the HP Tablet 10 and HP 650 here. (*Compare* July  
17                 11, 2018 P.M. Trial Tr. at 36:17–21 (identifying the HP Tablet 10 and HP 650  
18                 camera) *with Arctic Cat*, 876 F.3d at 1368 (identifying fourteen unmarked  
19                 products).) Thus, *Arctic Cat*’s conclusion applies here, which places the burden  
20                 squarely on Plaintiffs to come forward with proof that the HP Tablet 10 and HP 650  
21                 camera do not practice the '792 and '167 Patents, respectively. 876 F.3d at 1369.

22                 But Plaintiffs completely ignored this burden in their case-in-chief. They  
23                 presented ***no evidence*** to the jury on marking. Plaintiffs’ technical expert Dr. Kelly  
24                 made no effort to address whether the identified HP products practice the '792 and

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25  
26                 <sup>2</sup> Plaintiffs purchased the '792 and '167 Patents from HP. Thus, even before  
27                 Nikon met its burden of identifying unmarked products, Plaintiffs were already on  
28                 notice of HP’s license and its failure to mark years before this lawsuit was even  
filed.

1 '167 Patents. Dr. Kelly made zero mentions of HP, cited zero HP documents, and  
2 discussed zero HP products. (*See* July 12, 2018 P.M. Trial Tr. at 68:17–July 13,  
3 2018 A.M. Trial Tr. at 21:16.) This complete absence of evidence makes it  
4 impossible for any jury to conclude that Plaintiffs carried their burden on  
5 marking—they cannot prove that the identified HP products do not practice any  
6 claim of the asserted patents. *See Arctic Cat*, 876 F.3d at 1369. The Court should  
7 therefore grant judgment as a matter of law of no pre-filing damages.

8 **IV. PLAINTIFFS FAILED TO PROVE INFRINGEMENT FOR**  
9 **UNIDENTIFIED NIKON PRODUCTS**

10 It is also black letter patent law that Plaintiffs bear the burden of proving  
11 infringement. *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 702 F.3d  
12 1351, 1358 (Fed. Cir. 2012). When a patentee seeks to prove infringement for  
13 multiple devices, “it must make a prima facie showing of infringement as to each  
14 accused device.” *L & W, Inc. v. Shertech, Inc.*, 471 F.3d 1311, 1318 (Fed. Cir.  
15 2006). In their rush to present their case-in-chief, Plaintiffs completely ignored this  
16 basic requirement. Their technical expert Dr. Kelly failed to even identify the  
17 names of over 70 products he believes to be infringing, making it impossible for a  
18 jury to conclude that those unidentified products infringe.

19 For example, Dr. Kelly opined that 57 Nikon cameras infringe the '792  
20 Patent because they have Easy Panorama, but he only provided the names for 12:  
21 B700, P300, P340, P510, P900, P7800, AW1, AW130, V3, D3300, KeyMission 80,  
22 and L840. (July 12, 2018 A.M. Trial Tr. at 80:7–24.) The jury has no basis to  
23 identify the remaining 45 products, much less conclude that those unidentified  
24 products infringe the '792 Patent. (*See id.* at 88:1–2 (“Claim 14 is infringed by the  
25 Nikon cameras that *we identified.*”) (emphasis added).)

26 Dr. Kelly’s opinions for the Motion Snapshot feature are similarly lacking.  
27 There, he opined that 11 Nikon cameras infringe the '167 Patent but he only  
28 provided the names for 8: J1, J4, J5, S1, S2, AW1, V2, and V3. (July 12, 2018

1 A.M. Trial Tr. at 99:14–23.) Again, the jury has no basis to identify the remaining  
2 3 products and no way to conclude that those unidentified products infringe the  
3 '167 Patent.

4 And finally, Dr. Kelly's opinions are equally deficient for the Movie Live  
5 View feature. Dr. Kelly claimed 30 Nikon cameras infringe by virtue of the Movie  
6 Live View feature but he only identified 7 cameras: D5, D610, D750, D810,  
7 D3300, D5500, and D7200. (July 12, 2018 A.M. Trial Tr. at 114:18–115:3.) The  
8 jury cannot conclude that the remaining 23 unidentified products infringe, as they  
9 do not even know what they are. A blanket statement of "I looked at all of the  
10 manuals," without naming the corresponding products, is simply not enough to  
11 satisfy Plaintiffs' burden on infringement. (*See, e.g.*, July 12, 2018 A.M. Trial Tr.  
12 at 115:2–3.)

13 Accordingly, judgment as a matter of law of non-infringement is appropriate  
14 for the unidentified Nikon products and Plaintiffs' infringement case should be  
15 narrowed to the following: (1) B700, P300, P340, P510, P900, P7800, AW1,  
16 AW130, V3, D3300, KeyMission 80, and L840 for the '792 Patent (Easy Panorama  
17 feature); (2) J1, J4, J5, S1, S2, AW1, V2, and V3 for the '167 Patent (Motion  
18 Snapshot feature); and (3) D5, D610, D750, D810, D3300, D5500, and D7200 for  
19 the '167 Patent (Movie Live View). *See, e.g.*, *CCC Grp., Inc. v. Martin Eng'g Co.*,  
20 No. 05-cv-00086-RPM-MJW, 2008 WL 4277764, at \*8 (D. Colo. Sept. 17, 2008)  
21 (granting JMOL of non-infringement because accused products were custom  
22 installations based on individual customers' needs and patentee's expert failed to  
23 testify that each claim limitation is present in each accused product).

24 **V. PLAINTIFFS FAILED TO PROVE INFRINGEMENT BY  
25 REPRESENTATIVE PRODUCTS**

26 A patentee may attempt to prove infringement by using representative  
27 products. *See TiVo, Inc. v. EchoStar Commc'n Corp.*, 516 F.3d 1290, 1308 (Fed.  
28 Cir. 2008). However, representative product groupings do not relieve the patentee

1 of its burden to prove infringement with respect to each and every product accused  
2 of infringement. The patentee must still present evidence showing that each of the  
3 other products actually functions in the same manner as the representative product,  
4 and therefore also infringe. *Id.*; *Eugene Bratto, Textures, LLC v. Brushstrokes Fine*  
5 *Art, Inc.*, 701 F. Supp. 2d 1068, 1080-81 (W.D. Wis. 2010). Indeed, it “is  
6 plaintiff’s burden to prove by a preponderance of the evidence that each accused  
7 product practices all the elements of at least one claim of an asserted patent.” *Id.* at  
8 at 1080.

9       Here, Plaintiffs’ expert Dr. Kelly relied on source code to prove infringement  
10 for at least one limitation in each of the asserted claims. But Dr. Kelly did not  
11 examine the source code for the vast majority of the accused products. Nor is there  
12 any evidence addressing whether the examined source code is the same or  
13 substantially similar to the unexamined source code. As such, Dr. Kelly has no  
14 basis to extend his infringement read to the products for which he did not examine  
15 source code, which ultimately dooms the representative product theory. *See*  
16 *Medtronic Vascular, Inc. v. Boston Sci. Corp.*, No. 2:06-CV-78, 2008 WL 2744909,  
17 at \*3 (E.D. Tex. July 11, 2008) (granting JMOL of non-infringement for accused  
18 products that patentee’s expert failed to test for infringement); *Alloc, Inc. v. Pergo,*  
19 *L.L.C.*, No. 00-C-999, 2010 WL 3860382, at \*10 (E.D. Wis. Sept. 30, 2010), *aff’d*,  
20 426 F. App’x 909 (Fed. Cir. 2011) (granting summary judgment of non-  
21 infringement for untested products because expert provided no basis to show the  
22 untested products were the same as the tested products).

23       Starting first with the ’792 Patent and the Easy Panorama feature, Dr. Kelly  
24 only looked at the source code for the P300, P340, P510, P7800, AW1, V3, and  
25 D3300. (July 12, 2018 A.M. Trial Tr. at 80:13–17.) Yet, Dr. Kelly’s sole basis for  
26 accusing Nikon cameras of infringing the “processing a user execution of an  
27 erroneous operation” limitation of Claim 14 was based on his examination of  
28 source code (JTX-1956)—source code he did not examine for 50 Nikon products

1 (most of which are not even identified, *see supra* section IV). (July 12, 2018 A.M.  
2 Trial Tr. at 84:25–86:3 (discussing only source code evidence).) A similar problem  
3 exists for Claim 28 of the '792 Patent. For that claim, Dr. Kelly construed the  
4 “processing means” limitation to read on the algorithm described in figure 8 of the  
5 '792 Patent and he proceeded to map this algorithm to the same source code  
6 presented in JTX-1956. (July 12, 2018 A.M. Trial Tr. at 89:23–90:17 (discussing  
7 only source code evidence).) However, as explained earlier, Dr. Kelly did not  
8 examine the source code for the vast majority of Nikon products, even though his  
9 infringement read of the “processing means” requires source code. (July 12, 2018  
10 P.M. Trial Tr. at 6:3–5 (admitting he did not examine source code for 50 products).)  
11 There is no evidence upon which the jury can reasonably extend Dr. Kelly’s  
12 infringement read—which is based on source code—to products for which Dr.  
13 Kelly did not examine any source code. Plaintiffs presented no evidence in their  
14 case-in-chief that the source code presented in JTX-1956 is the same or  
15 substantially the same as the unexamined source code found in the other Nikon  
16 products accused of infringing the '792 Patent. (*See* July 12, 2018 P.M. Trial Tr. at  
17 66:8–July 13, 2018 A.M. Trial Tr. at 21:16.) Accordingly, judgment as a matter of  
18 law of non-infringement is appropriate for the unexamined products and Plaintiffs’  
19 infringement case should be narrowed to the P300, P340, P510, P7800, AW1, V3,  
20 and D3300 for the '792 Patent.

21 The same evidentiary shortcoming pervades the infringement proof for the  
22 '167 Patent as well. There, Dr. Kelly only looked at the source code for the S1,  
23 AW1, J4, V2, and V3 for the Motion Snapshot feature and the D5, D750, D810,  
24 and D5500 for the Movie Live View feature. Yet, he relied solely on source code  
25 to show the “trigger signal” limitation for both the Motion Snapshot and Movie  
26 Live View features. (July 12, 2018 A.M. Trial Tr. at 104:11–105:7 (discussing  
27 only source code for Motion Snapshot) and 118:17–119:4 (discussing only source  
28 code for Movie Live View).) Again, Plaintiffs failed to present evidence in their

1 case-in-chief that the examined source code is the same or substantially the same as  
2 the unexamined source code for cameras with Motion Snapshot or Movie Live  
3 View. (*See* July 12, 2018 P.M. Trial Tr. at 66:8–July 13, 2018 A.M. Trial Tr. at  
4 21:16.) Accordingly, judgment as a matter of law of non-infringement is also  
5 appropriate for the unexamined products in connection with the '167 Patent, and  
6 Plaintiffs' infringement case for that patent should be narrowed to the S1, AW1, J4,  
7 V2, and V3 (for Motion Snapshot) and D5, D750, D810, and D5500 (for Movie  
8 Live View). *Mobile Telecomms. Techs., LLC v. Samsung Telecomms. Am., LLC*,  
9 No. 2:13-cv-259, 2014 WL 7146971, at \*2 (E.D. Tex. Dec. 12, 2014) (“It is without  
10 question that [the patentee] must prove infringement for each of the accused  
11 products by a preponderance of the evidence, and that [the patentee] bears the risk  
12 of using representative products.”).

13           **VI. PLAINTIFFS FAILED TO PROVE INFRINGEMENT OF**  
14           **METHOD CLAIM 14 OF THE '792 PATENT**

15           To prove infringement of a method claim, a patentee must show at least one  
16 specific instance of use of the claimed method in the U.S. *E-Pass Techs., Inc. v.*  
17 *3Com Corp.*, 473 F.3d 1213, 1222 (Fed. Cir. 2007). Plaintiffs failed to carry that  
18 burden at trial, as they introduced no evidence of customers using the claimed  
19 method. Instead, Dr. Kelly's infringement testimony focused solely on the  
20 structures within the Nikon cameras, as highlighted by the summary he provided:  
21 “Claim 14 is infringed **by the Nikon cameras** that we identified.” (July 12, 2018  
22 A.M. Trial Tr. at 88:1–2 (emphasis added).) He never opined that a **customer** in the  
23 U.S. has practiced the method of Claim 14, or that one of the Nikon defendants has  
24 practiced the claimed method in the U.S. (*See* July 12, 2018 P.M. Trial Tr. at 66:8–  
25 July 13, 2018 A.M. Trial Tr. at 21:16.)

26           In fact, the evidence for method Claim 14 is even shallower than that  
27 presented in the *E-Pass* case, which found the reliance on instruction manuals to be  
28 too speculative “to conclude that any customer actually performed the claimed

1 method.” *E-Pass*, 473 F.3d at 1222. Here, Plaintiffs’ infringement expert Dr.  
2 Kelly admitted that the Nikon products are unlikely to be used in an infringing  
3 manner, as correct operation of Easy Panorama cannot infringe: “If there’s no  
4 erroneous operation [of Easy Panorama] by the user, there won’t be an error  
5 message . . . That actual use of Claim 14 would not infringe.” (July 12, 2018 P.M.  
6 Trial Tr. at 11:7–14.)

7 Accordingly, judgment as a matter of law of no infringement of method  
8 Claim 14 is appropriate because Plaintiffs failed to introduce any evidence of use of  
9 the claimed method, which forecloses both direct and indirect infringement of  
10 Claim 14. *E-Pass*, 473 F.3d at 1222.

11 **VII. PLAINTIFFS FAILED TO PROVE INFRINGEMENT OF**  
12 **CLAIMS 15 AND 23 OF THE ’167 PATENT**

13 Basic tenets of patent law require Plaintiffs to introduce evidence of  
14 infringement for each and every limitation of each asserted claim during their case-  
15 in-chief. *See, e.g., Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S.  
16 191, 198–9 (2014) (summarizing cases explaining patentee’s burden to prove  
17 infringement). Plaintiffs failed to carry this burden for the “memory arrangement”  
18 and “sensory data capture circuit arrangement” limitations of independent Claim 15  
19 of the ’167 Patent. Instead of identifying the structure in Nikon’s products that  
20 purportedly meet these limitations, Plaintiffs’ technical expert Dr. Kelly skipped  
21 over them. For the “memory arrangement,” he merely answered “No” to whether  
22 the term is in dispute. (July 12, 2018 A.M. Trial Tr. at 120:21–24.) Dr. Kelly  
23 never identified the structure in the Nikon products that allegedly meets this  
24 limitation. (*See* July 12, 2018 P.M. Trial Tr. at 66:8–July 13, 2018 A.M. Trial Tr.  
25 at 21:16.). He provided a similar answer for the “sensory capture circuit  
26 arrangement” limitation, and again failed to identify any structure in the Nikon  
27 products that allegedly meets this limitation. (July 12, 2018 A.M. Trial Tr. at  
28 121:13–16.)

1       Because Plaintiffs failed to carry their burden of proving infringement of  
2 each and every limitation of Claim 15 for the Nikon products, judgment as a matter  
3 of law of non-infringement is appropriate for independent Claim 15 as well as  
4 Claim 23, which depends on Claim 15. *See, e.g., Intellectual Sci. & Tech., Inc. v.*  
5 *Sony Elecs., Inc.*, 589 F.3d 1179, 1187 (Fed. Cir. 2009) (granting summary  
6 judgment of non-infringement because patentee failed to “specifically identify[] the  
7 allegedly infringing structure in the accused device”).

8                   **VIII. PLAINTIFFS FAILED TO PROVE DIRECT INFRINGEMENT  
9 BY NIKON CORPORATION**

10       Plaintiffs bear the burden of proving patent infringement. *Creative*  
11 *Compounds, LLC v. Starmark Labs.*, 651 F.3d 1303, 1314 (Fed. Cir. 2011). Direct  
12 infringement requires proof that Nikon “makes, uses, offers to sell, or sells [the  
13 accused products] within the United States or imports into the United States . . .”  
14 35 U.S.C. § 271(a).

15       Here, Plaintiffs introduced no evidence during their case-in-chief that Nikon  
16 Corporation, a Japanese entity, performs any act of direct infringement in the U.S.  
17 The record is devoid of any evidence suggesting that Nikon Corporation makes,  
18 uses, offers to sell, or sells any products in the U.S. or imports products into the  
19 U.S. (*See generally* July 11, 2018 P.M. Trial Tr., July 12, 2018 Trial Tr., and July  
20 13, 2018 A.M. Trial Tr.) Faced with this lack of evidence, a reasonable jury must  
21 necessarily conclude Nikon Corporation does not infringe any asserted claim of the  
22 ’792 or ’167 Patents, and thus, judgment as a matter of law of no direct  
23 infringement as to Nikon Corporation is appropriate.

24                   **IX. PLAINTIFFS FAILED TO PROVE INDUCED  
25 INFRINGEMENT BY EITHER NIKON CORPORATION OR  
26 NIKON INC.**

27       In order to present a *prima facie* case of induced infringement, the patentee  
28 must show that “the alleged infringer knew or should have known his actions would  
induce actual infringement.” *DSU Med. Corp. v. JMS Co., Ltd.*, 471 F.3d 1293,

1 1304 (Fed. Cir. 2006) (*en banc* in relevant part). This includes proof that the  
2 accused infringer knew of the patent. *Id.* Induced infringement also requires proof  
3 of a specific intent to induce—i.e., something more than “just intent to cause the  
4 acts that produce direct infringement . . .” *Id.* at 1306.

5 At trial, Plaintiffs failed to prove either requirement of induced infringement  
6 for both Nikon Corporation and Nikon Inc. During Plaintiffs’ case-in-chief, they  
7 presented no evidence that Nikon Inc. knew about the patents prior to the start of  
8 this lawsuit, much less before Nikon Corporation designed the products and Nikon  
9 Inc. sold them. In fact, the record evidence is empty on inducement. The only  
10 aspect of infringement addressed by Plaintiffs’ case-in-chief are (1) whether certain  
11 limitations of the asserted claims are infringed by the Nikon products (*See* July 12,  
12 2018 P.M. Trial Tr. at 66:8–July 13, 2018 A.M. Trial Tr. at 21:16 (testimony by  
13 Plaintiffs’ technical expert) and (2) whether Nikon Corporation designed the Easy  
14 Panorama, Motion Snapshot, and Movie Live View features. (*See* July 12, 2018  
15 A.M. Trial Tr. at 6:20–18:11; 21:9–28:11; 41:21–54:18.) But these pieces of  
16 evidence are legally insufficient to create a triable issue on induced infringement.  
17 There is no evidence that Nikon Inc. knew about the ’792 or ’167 Patents before an  
18 act of direct infringement. Nor is there any evidence that a Nikon defendant  
19 actively encouraged its customers to infringe the ’792 or ’167 Patents after learning  
20 of the patents. User manuals describing the camera features accused of  
21 infringement, standing alone, do not create a triable issue of induced infringement.  
22 *ACCO Brands, Inc. v. ABA Locks Mfr. Co., Ltd.*, 501 F.3d 1307, 1313–14 (Fed. Cir.  
23 2007).

24 Accordingly, judgment as a matter of law of no induced infringement for  
25 both Nikon Corporation and Nikon Inc. is appropriate.

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1                   **X. PLAINTIFFS FAILED TO PROVE CONTRIBUTORY**  
2                   **INFRINGEMENT BY EITHER NIKON CORPORATION OR**  
3                   **NIKON INC.**

4                   To prove contributory infringement, the patentee must prove (1) there is  
5                   direct infringement; (2) the accused infringer had knowledge of the patent; (3) the  
6                   component has no substantial non-infringing uses; and (4) the component is a  
7                   material part of the invention. *Fujitsu Ltd. v. Netgear Inc.*, 620 F.3d 1321, 1326  
8                   (Fed. Cir. 2010). Moreover, “Section 271(c) has a territorial limitation requiring  
9                   contributory acts to occur in the United States.” *DSU Med.*, 471 F.3d at 1304.  
10                  Plaintiffs failed to carry their burden on all prongs of contributory infringement,  
11                  and accordingly, judgment as a matter of law of no contributory infringement is  
12                  appropriate.

13                  First, Plaintiffs never introduced any evidence of direct infringement that  
14                  could be tied to contributory infringement. Second, Plaintiffs introduced zero  
15                  evidence in their case-in-chief regarding Nikon Inc.’s knowledge of the ’792 and  
16                  ’167 Patents. Third, the evidence shows that there are substantial non-infringing  
17                  uses for the Nikon cameras; for example, Plaintiffs’ technical expert Dr. Kelly  
18                  admitted that correctly taking a panorama photograph using Easy Panorama does  
19                  not infringe. (July 12, 2018 P.M. Trial Tr. at 11:7–11.) Fourth, the accused Nikon  
20                  products are not components—they are complete cameras. And fifth, as described  
21                  above in section VIII, Plaintiffs introduced no evidence during their case-in-chief  
22                  that Nikon Corporation, a Japanese entity, performs any act of infringement in the  
23                  U.S.

24                  Because no reasonable jury can conclude the Nikon defendants contributed to  
25                  infringement, judgment as a matter of law of no contributory infringement for both  
26                  Nikon Corporation and Nikon Inc. is appropriate.

1           **XI. CONCLUSION**

2           For the foregoing reasons, Nikon respectfully requests that the Court grant  
3 judgment as a matter of law on the following six issues: (1) no damages pre-dating  
4 the complaint because of a failure to comply with the marking statute; (2) no  
5 infringement as to unidentified products; (3) no infringement by representative  
6 products; (4) no infringement of method Claim 14 of the '792 Patent; (5) no  
7 infringement of Claims 15 and 23 of the '167 Patent; (6) no direct infringement by  
8 Nikon Corporation; (7) no induced infringement by Nikon Corporation and Nikon  
9 Inc.; and (8) no contributory infringement by Nikon Corporation and Nikon Inc.

10  
11 Dated:       July 17, 2018

Respectfully submitted,

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18           **NIKON CORPORATION;**  
19           **AND NIKON INC.**